Filed 3/11/09 Holley v. Cochran Firm CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

SHAWN CHAPMAN HOLLEY, Plaintiff and Respondent, v. THE COCHRAN FIRM et al., Defendants and Appellants.	B201114 (Los Angeles County Super. Ct. No. BC367055)

APPEAL from an order of the Superior Court of Los Angeles County. Gregory W. Alarcon, Judge. Reversed.

Ford and Harrison, Lyne A. Richardson and Steven M. Kroll for Defendants and Appellants.

Hadsell Stormer Keeny Richardson & Renick, Dan Stormer, Virginia Keeny and Cornelia Dai for Plaintiff and Respondent.

A lawyer sued her former law firm for wrongful termination and discrimination. The firm moved to compel arbitration under the terms of a written, but unsigned, employment contract. The trial court denied the motion to compel arbitration, and the firm then filed this appeal. We reverse, and remand the cause with directions to the trial court to grant the firm's motion to compel arbitration.

FACTS

In late 2003, The Cochran Firm hired Shawn Chapman Holley as an attorney in the firm's Los Angeles office.[1] In February 2005, the firm — through partner Keith Givens — offered Holley a position as the firm's "Western Regional Criminal Defense Liaison Counsel." The contract offer included a two-year contract term and a salary tied to the revenues of the firm's criminal defense section. In conjunction with the firm's offer, Givens forwarded a copy of a draft written employment contract to Holley, which Holley reviewed, and which Holley and Givens subsequently discussed by email and on the phone. In the course of those discussions, Givens agreed to revise the terms of the employment contract to provide for a three-year contract term, rather than a two-year term, and to expand Holley's territory of responsibility from the firm's western region to the entire country. Holley otherwise agreed to "all the terms" that were set forth in the draft written employment contract, and Givens promised to forward a revised written employment contract to Holley. Although the written employment contract did not get signed, Holley performed substantial services as the firm's liaison counsel from February to December 2005.

In December 2005, Givens informed Holley that her tenure as liaison counsel would be reduced from a term of three years to the next three months. At the same time, Givens also informed Holley that, during her remaining tenure, she would receive a flat

---

[1] According to Holley's complaint, The Cochran Firm is a national law firm with offices in Los Angeles and several other states. Except where an individual is identified for purposes of establishing context, our references to the firm include the following partners and/or managing partners of the firm: Keith Givens, Sam Cherry, Ron Miller, Randy McMurray, Brian Dunn, and Bruce Fishelman.

salary instead of a salary based on the revenue of the firm's criminal defense section. In January 2006, Givens told Holley that she and the firm were "going in a different direction," and that she should begin "transitioning" out of the firm. Shortly thereafter, Holley was instructed to remove her belongings from her office, following which all of the locks to the firm's doors were changed.

In February 2007, Holley sued the firm. Holley's complaint alleges nine causes of action: (1) racial discrimination in violation of the California Fair Employment and Housing Act (FEHA); (2) gender discrimination in violation of the FEHA; (3) breach of employment contract comprised of "Givens' oral and written promises;" (4) breach of the implied covenant of good faith and fair dealing in her written/oral employment contract; (5) wrongful termination in violation of public policies against false advertising, whistle blowing and discrimination; (6) fraud; (7) retaliation in violation of the FEHA; (8) libel; and (9) intentional infliction of emotional distress.[2]

In July 2007, the firm filed a motion to compel arbitration. The firm's motion was based on an arbitration provision set forth in a copy of a written employment contract attached to its motion. The proffered employment contract had a heading which indicated that it had been drafted in February 2005, but it was not signed by either Holley or any member of the firm. Holley opposed the motion to compel arbitration, arguing, among other points, that the " 'draft agreement' . . . was never executed."

On July 26, 2007, the trial court denied the firm's motion to compel arbitration for two stated reasons: (1) "neither [Holley] nor [the firm] signed the contract at issue;" and, (2) "No evidence was presented that the parties ever discussed or agreed to arbitration."

The firm filed a timely notice of appeal.

---

[2] For reasons not relevant to the issues in this appeal, the matter was argued twice to our court. At the original argument in September 2008, counsel for Holley indicated that she would not be pursuing any claims based on a written contract, as a "judicial admission."

DISCUSSION

I.

In a series of interrelated arguments, the firm contends Holley agreed to the terms in the draft written employment contract, meaning she agreed to its arbitration provision. We agree.

A. The Ground Rules

"A written agreement to submit to arbitration . . . a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." (Code Civ. Proc., § 1281.) "On petition of a party . . . alleging the existence of a written agreement to arbitrate a controversy . . . , the court shall order the [parties] to arbitrate if [the court] determines that an agreement to arbitrate the controversy exists . . . ." (Code Civ. Proc., § 1281.2.)

In the employment context, a "written agreement" to arbitrate does not require that the writing memorializing the arbitration agreement must be signed by the employer and its employee. On the contrary, as Division One of our Court explained in *Craig v. Brown & Root, Inc*. (2000) 84 Cal.App.4th 416 (*Craig*), general principles of contract law are applied to determine whether the parties entered a binding agreement to arbitrate, and that such an agreement may be shown by an employee's express acceptance of an agreement, or may be implied-in-fact by the parties' conduct. (*Id*. at p. 420.) In *Craig*, substantial evidence established that the employer hired plaintiff in 1981, that the employer adopted a dispute resolution program in 1993, that plaintiff received a brochure explaining the employer's program (including terms for the arbitration of legal disputes) in 1993 and 1994, and that plaintiff continued to work for the employer until 1997, at which time he was terminated. Based on these facts, Division One ruled that the evidence supported the conclusion that the employer and plaintiff agreed to arbitration. (*Id*. at pp. 420-422.)

On appeal a trial court's finding that the parties agreed to arbitrate or, conversely, that they did not agree to arbitrate, will be affirmed when the court's finding is supported by substantial evidence. (See, e.g., *Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 357 (*Banner Entertainment*).)

B. The Firm's Contentions on Appeal

The firm contends: (1) the absence of signatures on the draft written employment contract does not make its arbitration provision unenforceable; (2) the parties came to a "meeting of the minds" on the terms of the written employment contract; (3) Holley's complaint alleges that the written employment contract is binding; (4) Holley cannot "pick and choose" which provisions of the written employment contract are enforceable; and (5) Holley's complaint does not allege a "de facto implied-in-fact contract." We consider the firm's contentions to embody this fundamental argument: (1) the trial court found that the parties did not agree to arbitrate their disputes, and (2) the court's finding is not supported by substantial evidence. We agree with the firm.

C. The Trial Court's Finding That No Agreement To Arbitrate Exists Is Not Supported by Substantial Evidence

1. The Evidence

The firm supported its motion to compel arbitration with excerpts from Holley's deposition testimony.[3] Holley's deposition testimony included the following exchange:

> "Q. So upon reviewing the first draft of the agreement, you did not agree with all the terms; correct?
>
> A. Correct.
>
> Q. And . . . you did not agree with was the term regarding . . . the duration of the contract?
>
> A. Correct.
>
> Q. And also the scope of where the gross revenues would be deriving from?

---

[3] The firm deposed Holley in late May 2007, about one month before it filed its motion to compel arbitration.

A. Correct.

Q. Were you agreeable to the other terms of the agreement other than those two?

A. Yes.

Q. So . . . in renegotiating the agreement with Mr. Givens, the only two terms that you were focused and concerned about renegotiating were duration and scope; correct?

A. Correct.

Q. And he was agreeable to amending the agreement from two years to three years; correct?

A. Yes.

Q. And he was agreeable to amending the scope of the revenue pool from the western region to the entire county?

A. Yes. [¶] . . . [¶]

Q. And when did you receive the . . . revised version [of the written contract,] which would have been the second draft?

A. Within days. [¶] . . . [¶]

Q. And did the second draft of the agreement contain the revision to include the scope of the revenues from the western region changed to the entire country?

A. Yes.

Q. And did the second draft or the revised agreement make the change from a duration of two years to three years?

A. Yes.

Q. And were there any other changes to the agreement that you can recall other than those two changes?

A. Not that I can recall.

Q. Now, what did you do upon receipt of the second draft of the agreement?

A. I don't know. ***I know that [Mr. Givens] and I spoke and discussed that it was fine, that we'd reached an agreement***. I don't know if I signed it and sent it back or whether he said we would sign it when he

came to L.A. because he was coming to L.A. pretty frequently at that time. But it never happened. [¶] . . . [¶]

Q. [¶] . . . [¶] ***Were you agreeable with all the terms of the second draft of the agreement?***

A. ***Yes.***

Q. ***So as far as you were concerned, there wasn't any . . . further negotiations to occur based on the terms of the second agreement; correct?***

A. ***Correct***." (Boldface and italics added.)

2. Analysis

After examining the record for substantial evidence in support of the trial court's decision that no agreement to arbitrate exists, we find the evidence establishes just the opposite. Holley's own deposition testimony shows without any dispute, equivocation, or ambiguity that she read and reviewed the written employment contract, and that she agreed to "all the terms" in the draft written employment contract, and that, in her own words, the parties had "reached an agreement."

The absence of signatures is, in our view, irrelevant for the reasons explained in *Banner Entertainment*, *supra*, 62 Cal.App.4th 348. *Banner Entertainment* teaches these lessons: (1) When parties mutually agree that a contract will not become binding unless and until a written contract is signed by the parties, the failure to sign a written contract means that no binding contract was created; (2) When parties orally agree on all the terms set forth in a proposed written contract (including an arbitration provision), the fact that the parties have not yet signed the writing does not alter the binding validity of their oral agreement to the terms in the writing; (3) The question whether parties mutually intended that no contract would be formed until signatures were affixed to a written contract, or, conversely, whether they mutually intended that their oral agreement to the terms contained in a proposed written agreement would be binding immediately, is to be determined from the facts and circumstances presented in a particular case, and is a question of fact for the trial court. In deciding this question of fact, the presence or absence of a *signature* is not dispositive, but rather, it is the presence or absence of

evidence of an *agreement* to arbitrate which matters. (*Banner Entertainment*, *supra*, 62 Cal.App.4th at pp. 358-361.)

Banner Entertainment involved a dispute between Banner, a film producer, and Alchemy, a company which Banner contacted to act as a sales agent for two films outside the United States. During talks over several months, Banner and Alchemy exchanged draft contracts, letters, and comments on draft contracts. Later, Banner notified Alchemy that it was no longer authorized to act as Banner's sales agent. Alchemy thereafter served a demand for arbitration on Banner in accord with an arbitration agreement in the draft contracts and letters. (*Id*. at pp. 352-353.) The trial court granted Alchemy's petition to compel arbitration. Division Four of our court granted Banner's petition for writ of mandate, and directed the trial court to vacate its order, finding "there is no evidence at all which would support a finding of an agreement to arbitrate . . . ." (*Id*. at p. 357.) In an ensuing, well-developed argument, Division Four explained that the evidence showed that the parties agreed that signatures would be required to conclude a final contract, and that the draft contracts which were still being exchanged up to the time that Alchemy was terminated continued to include new terms which the parties had not discussed and upon which they not reached any agreement. (*Id*. at pp. 359-361.)

The law is fairly consistent through *Craig* and *Banner Entertainment*, and a host of other cases. Arbitration will be compelled when the parties have mutually consented to be bound by an arbitration agreement memorialized in writing, but will not be required to arbitrate when no such agreement exists. The cases are variant, because the facts are variant. So, what matters in Holley's current case is this: the undisputed evidence shows that she agreed to "all the terms" of the draft written employment contract, meaning she agreed to its arbitration provision as well. Holley's deposition testimony is replete with express statements that she agreed to the terms set forth in the draft written employment contract, and her statements cannot be ignored because she now finds them inconvenient.

To avoid her own admissions, Holley argues Paragraph 11.5 of the draft written employment contract states that the contract would not be binding unless and until it was signed. We disagree. Had the parties contemplated that signatures were a condition precedent to a binding agreement, they could have and would have said so with express language. But they did not. This is what Paragraph 11.5 states: "Binding Effect. By executing this Agreement, each of the parties warrants and represents that she or it has full authority to enter in and bind this Agreement. . . ." We do not construe Paragraph 11.5 to provide: This agreement will not become binding or enforceable unless and until it is signed by both parties to the agreement. Words can be the most direct and best indicator of intent, and we see no expression of intent in Paragraph 11.5 that the parties contemplated that they would not have a contract until signatures were affixed to a piece of paper.

In a different vein, Holley contends we should ignore her deposition testimony for this reason: "[The firm] should not be permitted to benefit from defense counsel's artful deposition questioning . . . ." We summarily reject this argument because none of the legal authorities cited by Holley supports her argument that the law forbids a party from being represented by a skilled lawyer. Holley's apparent failure to appreciate that her deposition answers possibly implicated an issue in her case, to wit, arbitration, is not a reason to ignore her testimony.

II.

In a series of interrelated arguments, the firm contends all of Holley's claims are covered by the arbitration provision in the written employment contract. We agree.

A. The Language used in the Arbitration Provision

The arbitration provision at issue in Holley's current case provides:

> " . . . ***any dispute*** or claim of breach, default or misrepresentation ***regarding this Agreement*** shall be resolved exclusively through submission of the matter to binding arbitration . . . ." (Boldface and italics added.)

B. Interpreting of the Language used in the Arbitration Provision

In our view, the phrases "*any dispute . . . regarding this Agreement*" is broad enough to cover all of Holley's claims for damages, whether those claims arise from the written employment contract, statute or tort. (See generally, *Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 684-687.)

Holley's discussion of *Medical Staff of Doctors Medical Center in Modesto v. Kamil* (2005) 132 Cal.App.4th 679 (*Kamil*) does not persuade us differently. In *Kamil*, the Blue Cross insurance company instituted new protocols for approving certain medical procedures, prompting complaints from doctors that the insurer's new policies were too restrictive. Blue Cross responded by publishing statements to that effect that a lot of doctors perform a lot of unnecessary medical procedures. Several doctors then sued Blue Cross on claims that the insurer had damaged their professional reputations. Blue Cross moved to compel the doctors to arbitrate their claims. The arbitration provision at issue in *Kamil* provided: " 'In the event that any . . . dispute *concerning the terms of this Agreement* . . . is not satisfactorily resolved, [the parties] agree to arbitrate such . . . dispute.' " (*Id.* at pp. 682-683, italics and underscoring added.) Division Six of our court ruled that this arbitration provision did not cover the doctors' claims against Blue Cross because the doctors' claims did not "*concern the terms of their contracts*" with the insurer. (*Id*. at pp. 683-687.)

We consider *Kamil* inapposite to Holley's current case because, in our view, the phrase "any dispute concerning the ***terms*** of this agreement" circumscribes a narrower class of claims that does the phrase "any dispute regarding this agreement." Any dispute "regarding this agreement" means any dispute arising from the agreement.

III.

Holley next contends the trial court's order denying the firm's motion to compel arbitration should be affirmed under the "right result/wrong reason" rule of appellate review. (See *Davey v. Southern Pacific Co*. (1897) 116 Cal. 325, 329.) None of Holley's arguments persuade us to affirm the trial court's order.

1. Standing

Holley contends the six individual defendants named in her complaint — i.e., the firms' partners and managing partners — lack standing to compel her to take her claims to arbitration. Given the allegations in Holley's complaint, and the procedural posture of this case, we conclude her position would yield an untenable result.

Generously construed, Holley's complaint alleges that the individual defendants acted at all times within the course and scope of their role as representatives of the firm, and that they assisted each other, and conspired with each other, to commit the wrongful acts alleged in Holley's complaint. In short, Holley alleges that the individual defendants all acted jointly to effect the termination of her employment contract with the firm, and acted jointly to discriminate against her based on race and gender. Given Holley's claims that the individual defendants, though not parties to the employment contract, were acting as agents for the firm, they were entitled to the benefit of the arbitration provision. (*Michaelis v. Schori* (1993) 20 Cal.App.4th 133, 139.)

2. Waiver

Holley contends the firm waived its contractual arbitration rights by its conduct in her case. We disagree.

A decision to compel arbitration is strongly favored over a decision finding that arbitration has been waived, and, for this reason, a party who resists arbitration on the ground of waiver bears a heavy burden. (*Christensen v. Dewor Developments* (1983) 33 Cal.3d 778, 782; see also *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195 (*St. Agnes Med. Center*).) "[D]oubts regarding a waiver allegation should be resolved in favor of arbitration." (*St. Agnes Med. Center, supra*, 31 Cal.4th at p. 1195.)

Holley contends we must impose a finding of waiver against the firm based upon these four facts: (1) she filed her complaint in February 2007; (2) the firm filed an answer to her complaint; (3) the firm deposed her; and (4) the firm did not file its motion to compel arbitration until July 2007. We find these facts do not, as a matter of law, establish a waiver of the right to arbitration.

In our view, the firm's limited litigation efforts and delay did not affect a waiver of its right to seek arbitration. First, the firm's act of filing an answer means very little. In filing an answer, the firm did no more than what it was supposed to do lest its default be entered. Second, we note that the firm's answer pleaded as an affirmative defense that Holley's claims were subject to arbitration, negating any suggestion that it was waiving its right to arbitration. Third, the firm was within its rights under both the Discovery Act and the Arbitration Act to dispose Holley promptly, and cannot be faulted for doing so. (See Code Civ. Proc., §§ 1283.05, subd. (a), 2025.010 et seq.) Indeed, Holley's deposition developed the facts confirming the firm's right to seek arbitration.

Holley cites *Davis v. Blue Cross of Northern California* (1979) 25 Cal.3d 418 (*Davis*) for a different conclusion. Holley and *Davis* are off the mark. *Davis* involved class action allegations that Blue Cross had adopted an interpretation of its hospitalization policies, which resulted in regular denials of benefits to which its insureds were entitled. (*Id.* at p. 421.) The trial court denied Blue Cross's petition to compel plaintiffs to arbitrate their claims. The Supreme Court affirmed that trial court's ruling, and, in the process, set forth the trial court's findings and conclusions, which supported the denial of arbitration:

> "[T]he trial court relied on a number of circumstances in finding that Blue Cross had waived its right to compel the plaintiffs to resort to arbitration. Initially, the court found that by virtue of the obscure placement and ambiguous wording of its arbitration clause, Blue Cross had reason to know that its insureds would frequently be unaware of their right to arbitration or of the procedures by which it could be initiated. The court then found that despite this knowledge, Blue Cross had not taken any steps to apprise its insureds of such arbitration procedure. Adverting to the typical rejection letter which Blue Cross had sent to the named insureds, the trial court noted that even after learning that its insureds did not agree with its determinations as to the benefits available under the policy, Blue Cross had failed to bring the arbitration procedure to its insureds' attention. Instead it had simply reiterated in unequivocal terms its rejection of the insureds' claim. [¶] The court found that in this context Blue Cross' failure to inform its insureds of the policy's arbitration provision amounted to an 'implied misrepresentation . . . that such subscribers have no recourse but to accept the Blue Cross determination . . . .' Indeed, the court

> additionally determined that Blue Cross had adopted its course of conduct 'for the purpose of inducing subscribers to give up their rights under the Blue Cross insurance contracts.' On the basis of these cumulative findings, the court concluded that Blue Cross had breached the duty of good faith and fair dealing owed to its insureds and that, by virtue of such breach, Blue Cross had waived its right to demand arbitration." (*Davis, supra*, 25 Cal.3d at pp. 426-427.)

Davis is not similar to Holley's current case. In Holley's case, we do not have an insurance company taking advantage of a "lay person." On the contrary, the agreement to arbitrate in Holley's case was negotiated by lawyers on both sides of the aisle. Given this circumstance, we believe the better rule is that, when a lawyer agrees to arbitrate claims against her employer, she ought to be bound by her agreement. In addition, the contract in Holley's current case does not involve an "ambiguous" or "obscurely placed" arbitration provision. We also see no evidence that the firm engaged in conduct which equates with a "misrepresentation" regarding the availability of arbitration. In summary, we see no support for Holley's waiver claim.

3. Prejudice

Holley contends the firm should not be permitted to compel arbitration because she will suffer prejudice. We disagree.

A party who resists arbitration may establish "prejudice" from being compelled to arbitrate by showing that the party seeking arbitration has engaged in conduct which has substantially undermined the strong public policy in favor of arbitration, or has otherwise substantially impaired the former's ability to take advantage of the beneficial efficiencies of arbitration. (*St. Agnes Med. Center, supra*, 31 Cal.4th at pp. 1203-1204.) Holley's arguments on appeal do not persuade us that her current case involves such "prejudice."

Holley cites *Davis v. Continental Airlines, Inc*. (1997) 59 Cal.App.4th 205 (*Continental Airlines*) and *Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553 (*Guess*). Neither case, in our view, is similar to Holley's current case.

These were the facts in *Continental Airlines*: the defendants "did nothing to bring about arbitration for approximately six months [after plaintiff filed her action]. In the meantime they used court discovery procedures to obtain 1,600 pages of documents from

plaintiff in 86 categories and to take plaintiff's 2-day . . . videotaped deposition." (*Continental Airlines*, *supra*, 59 Cal.App.4th at p. 213.) "After obtaining [this] discovery from plaintiff by court processes, defendants then . . . sought to change the game to arbitration, where plaintiff would not have equivalent discovery rights." (*Id*. at p. 215.)

These were the facts in *Guess*:

> "[Defendant]'s . . . conduct [was] wholly inconsistent with its present desire to arbitrate. [Defendant] moved for a stay, claiming an altruistic interest in judicial economy. When that effort failed, [defendant] fully participated in the discovery process, objecting to [plaintiff]'s interrogatories and demands for production on a variety of grounds, but never once suggesting that discovery should be barred because this dispute had to be arbitrated. [Defendant] sent two sets of lawyers to the third-party depositions and took full advantage of every opportunity to cross-examine the deponents, but did not suggest that depositions were inappropriate because this dispute had to be arbitrated. For four months, [defendant] remained mute on the subject of arbitration but vocal, in court and out, on the subject of its other objections to [plaintiff]'s discovery demands, taking full advantage of the opportunity to test the validity of [plaintiff]'s claims, both legally and factually, primarily at [plaintiff]'s expense. . . . [¶] [In addition, Plaintiff was] exposed to the substantial expense of pretrial discovery and motions that would have been avoided had [defendant] timely . . . asserted a right to arbitrate. Through its use of the discovery process, [plaintiff] . . . disclosed at least some of its trial tactics to [defendant], certainly more so than would have been required in the arbitral arena. Through [defendant]'s delay — which it has not even *tried* to explain — [plaintiff] . . . lost whatever efficiencies that would otherwise have been available to it through arbitration." (*Guess*, *supra*, 79 Cal.App.4th at p. 558.)

In our view, the discovery imbalances and prejudice, which were present in *Continental Airlines* and *Guess*, are not present in Holley's current case. (Code Civ. Proc., § 1283.05; see also *Berglund v. Arthroscopic & Laser Surgery Center of San Diego, L.P.* (2008) 44 Cal.4th 528, 535.) Apart from showing that Holley was deposed, the record in the case before us today does not otherwise show that the firm has gained any significant discovery advantage over Holley.

4. Arbitrability

For the reasons stated above (see part II, *ante*), we reject Holley's contention that the majority of her claims are outside the scope of the arbitration agreement.

5. FEHA

Holley contends the arbitration provision in the written employment contract is unenforceable because it fails to satisfy the requirements for the arbitration of FEHA claims as set forth in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 (*Armendariz*). We disagree.

In *Armendariz*, the Supreme Court ruled that an employee may be compelled to arbitrate his or her FEHA claims provided the parties' arbitration agreement satisfies five requirements: the agreement must (1) afford more than minimal discovery; (2) require a written decision permitting limited judicial review; (3) provide the types of relief which would be available in civil court; (4) not impose costs on the plaintiff which are unique to arbitration; and (5) provides for a neutral arbitrator. (*Armendariz, supra*, 24 Cal.4th at pp. 102-103; see also *Abramson v. Juniper Networks, Inc*. (2004) 115 Cal.App.4th 638, 653-654.)

Holley contends the arbitration agreement which is at issue in her current case runs afoul of *Armendariz* because it requires her to pay costs associated with arbitration. Although Holley is correct that an arbitration provision in the written employment which requires an employee to bear any costs is per se "unconscionable," this does not mean that she is automatically excused from her promise to arbitrate. As *Armendariz* explains, an arbitration agreement is enforceable notwithstanding an unconscionable term, provided the unconscionable term can be severed from the agreement. (See *Armendariz, supra*, 24 Cal.4th at p. 124 ["If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate"].) This severance rule applies to an "unconscionable" cost-sharing provision. (See, e.g., *McManus v. CIBC World Markets Corp*. (2003) 109 Cal.App.4th 76, 101-102.)

DISPOSITION

The order denying the firm's motion to compel arbitration is reversed, and the cause is remanded to the trial court with directions to enter a new and different order granting the motion. Appellants are awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BIGELOW, J.

We concur:

RUBIN, Acting P. J.

FLIER, J.